Fruehauf Corporation *and* Truck Drivers and Helpers Local 568, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 15-CA-8201

December 16, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on June 10, 1981, by Truck Drivers and Helpers Local 568, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Fruehauf Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 15, issued a complaint and notice of hearing on July 9, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 13, 1981, following a Board election in Case 15-RC-6691, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about May 22, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On July 20, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 27, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 6, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent contends that the Union's certification is invalid in that the Board erred by overruling its objections to the election held in Case 15-RC-6691. Specifically, Respondent asserts that the Union and its agents threatened and harassed eligible voters and threatened them with bodily harm thereby creating an atmosphere of fear and coercion which rendered a fair election impossible. Respondent urges the Board to revoke the Union's certification on the grounds that the evidence presented in support of its objections in the underlying representation case at least raises substantial and material issues of fact requiring a hearing, particularly since the Fifth Circuit in *Hickory Springs Manufacturing Company*, 645 F.2d 506 (1981), denying enforcement and remanding 239 NLRB 641 (1978), rejected the rationale employed in part by the Acting Regional Director in overruling such objections.[2] Respondent argues in the alternative that no decision should be entered in this case until the Board has reconsidered its objections in light of the entire record, including all affidavits made in the representation case.[3] Respondent admits that it has refused to recognize and bargain collectively with the Union because it desires to test the correctness of the Board's Decision and Certification of Representative. Counsel for the General Counsel argues that Respondent is precluded from raising issues which were, or could have been, considered in the representation proceeding. We agree with the General Counsel's contention.

The election in Case 15-RC-6691 was conducted on October 16, 1980, pursuant to a Stipulation for Certification Upon Consent Election. The tally of

[1] Official notice is taken of the record in the representation proceeding, Case 15-RC-6691, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] In support of this position, Respondent also cited the United States Court of Appeals decisions in *N.L.R.B.* v. *Polyflex M Company*, 622 F.2d 128 (5th Cir. 1980), remanding 240 NLRB 1153 (1979); *N.L.R.B.* v. *Claxton Manufacturing Company, Inc.*, 613 F.2d 1364 (5th Cir. 1980), denying enforcement and remanding 237 NLRB 1393 (1978).

[3] Respondent claims, citing *N.L.R.B.* v. *Klingler Electric Corp.*, 656 F.2d 76 (5th Cir. 1981), enfg. 245 NLRB 1247 (1979), that the Board did not comply with Sec. 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, when it adopted the Acting Regional Director's Report on Objections, since the Acting Regional Director failed to include in the record those affidavits that he relied on in overruling Respondent's objections.

ballots shows that of approximately 20 eligible voters, 12 cast ballots for, and 6 against, the Union; there were no challenged ballots. Thereafter, Respondent filed timely objections to conduct affecting the results of the election. On December 2, 1980, the Acting Regional Director issued and served on the parties his Report on Objections in which he recommended overruling Respondent's objections and certifying the Union. After Respondent filed exceptions to the Acting Regional Director's report, the Board issued its Decision and Certification of Representative on April 13, 1981,[4] in which it adopted the Acting Regional Director's recommendation to overrule Respondent's objections and, accordingly, certified the Union as the exclusive bargaining representative of Respondent's employees in the appropriate unit.

In its decision overruling the objections, the Board noted Respondent's contention that the Acting Regional Director had erred by failing to attach to his report all affidavits and other documentary evidence secured during the Regional Office investigation of its objections. The Board concluded, citing *LTV Electrosystems, Inc.*, 166 NLRB 938 at fn. 2 (1967), enfd. 388 F.2d 683 (4th Cir. 1968), and *Golden Age Beverage*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1968), "that such materials are not a part of the record in a representation case 'within the meaning of Section 102.68 . . . of the Rules and Regulations of the Board, nor are such documents encompassed within the requirements of Section 9(d) of the Act.'" For the reasons stated in our recent decision in *Summa Corporation d/b/a Frontier Hotel*, 265 NLRB No. 46 (1982), we find the record before us in the representation proceeding contained all of the documents necessary and relevant for our review of the Acting Regional Director's report in light of Respondent's exceptions, as the Employer failed to present any evidence in support of its exceptions which would refute the findings of the Acting Regional Director. In such circumstances we are entitled to rely on the Acting Regional Director's report. Moreover, viewing the facts in the light most favorable to the Employer, the election objections raised no material issues of fact or law which would warrant setting aside the election results or directing a hearing under the standards articulated by the court in *Polyflex M Company* and *Claxton Manufacturing Company, supra*. Thus, we found that none of the conduct alleged as objectionable provided a basis for disturbing the election outcome.[5]

Furthermore, we specifically reject Respondent's assertion that *Hickory Springs Manufacturing, supra*, is applicable here. In that case the court agreed with the Regional Director that alleged pervasive threats of violence arguably made or adopted by the union raised issues which best could be resolved after a hearing. The alleged objectionable conduct there included employees' repeated threats of picket line violence at two meetings conducted by the union; the union representative's remark during such a meeting that whatever would be necessary on the picket line would be done; two employees' comments near the polling place on the election date "that if [employees] didn't vote yes they were going to get fired"; and the statement of the union's leading adherent and election observer immediately before the election "that if he found out anyone voted against the union, he was going to beat their ass."

Here, the alleged threat by the Union's business agent occurred outside the critical period and thus cannot serve as a basis for setting aside the election. *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961). We also note that employee David Boothe's alleged threat of picket line violence was the only other act of purported misconduct directly attributed to a specific employee. This incident, unlike those alleged as objectionable in *Hickory Springs Manufacturing, supra*, was isolated and did not occur in the presence of union organizers or in close proximity to the election date. For these reasons, we concluded in the underlying representation case that any conduct engaged in by Boothe, who clearly was not acting as the Union's agent, was insufficient to create a general atmosphere of coercion and fear of reprisal for failing to vote for the Union which would warrant setting aside the election. Moreover, we similarly found unobjectionable the minor acts allegedly committed by anonymous third persons.

It thus appears that, by raising the matters set forth in its objections to the election held in Case 15-RC-6691, Respondent is attempting to raise issues which were raised and decided in that case. It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

[4] Not reported in volumes of Board Decisions.

[5] See *Revco D.S., Inc. and/or White Cross Stores, Inc., No. 14* v. *N.L.R.B.*, 653 F.2d 264 (6th Cir. 1981); *Reichart Furniture Company* v. *N.L.R.B.*, 649 F.2d 397 (6th Cir. 1981).

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Fruehauf Corporation, a Michigan corporation, maintains a facility located in Shreveport, Louisiana, where it is engaged in the sale and service of semitrailers and truck equipment parts. During the past 12 months, a representative period, Respondent purchased and received at its Shreveport, Louisiana, facility materials and services valued in excess of $50,000 directly from points located outside the State of Louisiana.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Truck Drivers and Helpers Local 568, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All service department employees including mechanics and helpers employed by Respondent at its Shreveport, Louisiana, facility; excluding all parts department employees, office clerical employees, branch clerical employees, sales employees, professional employees, administrative employees, technicians, guards and supervisors as defined in the Act.

2. The certification

On October 16, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 15, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 13, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 21, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 22, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 22, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union

as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Fruehauf Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Truck Drivers and Helpers Local 568, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All service department employees including mechanics and helpers employed by Respondent at its Shreveport, Louisiana, facility; excluding all parts department employees, office clerical employees, branch clerical employees, sales employees, professional employees, administrative employees, technicians, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 13, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about May 22, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Fruehauf Corporation, Shreveport, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Truck Drivers and Helpers Local 568, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All service department employees including mechanics and helpers employed by Respondent at its Shreveport, Louisiana, facility; excluding all parts department employees, office clerical employees, branch clerical employees, sales employees, professional employees, administrative employees, technicians, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Shreveport, Louisiana, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's representative, shall be

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Truck Drivers and Helpers Local 568, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All service department employees including mechanics and helpers employed by us at our Shreveport, Louisiana, facility; excluding all parts department employees, office clerical employees, branch clerical employees, sales employees, professional employees, administrative employees, technicians, guards and supervisors as defined in the Act.

FRUEHAUF CORPORATION